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No. 89-1067

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,
v.
MARY R. WELLS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of Petitioner in this case. Respondents Mary R. Wells, *et al.*, have refused consent. In support of this motion, EEAC by the following shows that this brief brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties.

1. EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. All of EEAC's members, and the constituents of its trade association members, are employers subject to various employment and labor laws, including the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, the Labor Management Relations Act (LMRA), 29 U.S.C. § 141 *et seq.*, and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, all of which pre-empt suits under state law in certain circumstances. Many EEAC members are parties to collective bargaining agreements and have entered into, or may enter into in the future, collectively bargained severance pay agreements similar to that involved in the case at bar. Moreover, EEAC members conduct business in virtually all states, and are subject to state tort suits which are potentially pre-empted by federal law.

3. Thus, EEAC members have a substantial interest in the issues presented for review in this case—whether and when state tort claims of fraudulent misrepresentation arising out of a collectively bargained severance pay agreement are preempted by the NLRA, the LMRA, or ERISA.

The Fifth Circuit held that in order to show preemption under the NLRA, a party must show not only that its alleged conduct is "arguably prohibited" by § 8 of the NLRA, but also that it is likely to succeed on the

merits of the case before the National Labor Relations Board, two mutually inconsistent propositions. This conclusion conflicts with this Court's decisions in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and *International Longshoremen's Association v. Davis*, 476 U.S. 380 (1986), which require at most that the party seeking pre-emption put forth enough evidence to enable a court to conclude that the activity arguably is subject to the Act. Likewise, the Fifth Circuit ruled that future employment eligibility was a mandatory subject of bargaining, an issue which *Garmon* relegates to the exclusive jurisdiction of the Board.

The court below also held that because it could find no provision of GM's collectively-bargained Voluntary Employment Termination Plan (VTEP) specifically addressing Plaintiffs' claims, the action was not pre-empted by § 301 of the Labor Management Relations Act. This conclusion is in conflict with this Court's decision in *Allis-Chalmers Corporation v. Lueck*, 471 U.S. 202 (1985), and the decisions of several other courts of appeals concluding that § 301 pre-emption is not limited by the four corners of the contract.

Moreover, the Fifth Circuit also ruled that the VTEP was not an employee benefit *plan*, so that the broad pre-emptive provision of the Employee Retirement Income Security Act was inapplicable. In so doing, the court misconstrued this Court's holding in *Fort Halifax Packing Company, Inc. v. Coyne*, 107 S.Ct. 2211 (1987), which concluded that a state statute requiring a one-time severance payment in the event of a plant closing did not require the employer to maintain the type of administrative process that connotes an employee benefit plan. Since the VTEP *did* require such a process, the Fifth Circuit's holding that ERISA does not pre-empt this action is erroneous.

4. EEAC has participated as amicus curiae in several cases in this Court involving preemption of state suits

by federal law.[1] In addition, EEAC has filed amicus curiae briefs with this Court in a number of other cases dealing with the interrelationship between state and federal laws and the relationship between nondiscrimination laws and collective bargaining agreements.[2]

EEAC's interest in this case lies in its desire that the process of collective bargaining not be undermined by an unduly narrow interpretation of the pre-emptive force of federal labor laws, allowing persons in states that permit widely varied employment-related individual tort causes of action to resort to the state courts and state law to resolve disputes more properly addressed through application of uniform federal law. The decision of the Fifth Circuit below, which adopts a severely restrictive interpretation of pre-emption under the NLRA, the LMRA and ERISA, creates undue confusion among the employer community concerning the appropriate forum and applicable law in these cases.

Because of its significant experience, EEAC is uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally, as opposed to its significance to the immediate parties.

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[1] *See Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425 (1987) (§ 301 pre-emption); *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988) (§ 301 pre-emption); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (ERISA pre-emption). Moreover, the National Foundation for the Study of Equal Employment Policy, the educational foundation associated with EEAC, published a monograph entitled *Allis-Chalmers Corporation v. Lueck: The Impact of the Supreme Court's Decision on Wrongful Discharge Suits and Other State Court Employment Litigation* (1986).

[2] *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) (Title VII preclusion); *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (Title VII backpay and seniority); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980) (Title VII and a seniority system); *IUE, Local 790 v. Robbins & Meyers*, 429 U.S. 229 (1976) (Title VII and a grievance limitations period).

WHEREFORE, it is respectfully moved that EEAC be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

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January 26, 1990

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council ("EEAC"), respectfully submits this brief amicus curiae contingent upon the granting of the accompanying motion.[1] The brief supports the petition for a writ of certiorari filed in this case by General Motors Corporation, and urges reversal of the decision below.

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is fully set forth in the accompanying motion.

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[1] A letter of consent on behalf of the petitioner has been filed with the Clerk of the Court.

STATEMENT OF THE CASE

General Motors Corporation's (GM's) Packard Electric Division plant is located in Clinton, Mississippi. Pet. 2.[2] Employees at that plant are represented by Local No. 698 of the International Union of Electrical, Radio & Machine Workers, AFL-CIO. *Id.*

Due to a decline in the automobile industry, the Packard Electric plant held planned layoffs in 1982. Pet. App. 2a. A committee of union and management representatives negotiated a severance pay agreement known as the Voluntary Termination of Employment Plan (the VTEP). *Id.* Under the VTEP, eligible laid-off employees could receive from $10,000 to $22,000, payable in a lump sum or in 24 monthly installments, in return for terminating their employment relationship with GM and relinquishing seniority and other rights. Pet. 2-3; Pet. App. 41a-43a. After execution of the VTEP agreement, union and management officials met with employees to explain its terms. Pet. 4.

In 1985, GM began hiring new employees at the Packard Electric plant, but declined to consider the applications of former employees who had taken VTEP. Pet. 4. Plaintiffs, thirty-two former Packard Electric employees who took VTEP benefits, now claim that GM induced them to terminate their employment by fraudulently misrepresenting the consequences of accepting VTEP. Pet. App. 4a.

As the Fifth Circuit noted below, the issue of reemployment rights for those employees who chose the VTEP was discussed in the negotiations. Pet. App. 3a. According to GM, the issue of future employment eligibility was raised during the collective bargaining process as the VTEP was developed, where management negotiators

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[2] Citations to the Petition for a Writ of Certiorari are designated as Pet. ——. Citations to the Petitioner's Appendix, including those to the decision below, are designated as Pet. App. ——.

made it clear to the union representatives that employees who took VTEP would not be eligible to be rehired. *Id.* GM maintains as well that when the plan was presented to employees, they too were told that employees electing VTEP would not be eligible for future employment with GM. *Id.*

In contrast, plaintiffs claim that when union representatives asked about future employment rights during collective bargaining over the VTEP terms, they were told that it would be "no problem." *Id.* Plaintiffs further assert that when the plan was explained to them, they were told not only that they would be eligible for reemployment but that they would be given preference over other applicants. Pet. App. 46a.

Plaintiffs brought suit in federal district court, alleging claims under state law theories of fraud and misrepresentation. GM moved for summary judgment, arguing that the action was pre-empted (1) under the doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), because GM's alleged conduct was "arguably prohibited" by § 8 of the National Labor Relations Act, 29 U.S.C. § 158, thus placing jurisdiction with the National Labor Relations Board and depriving the district court of subject matter jurisdiction; (2) under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, because it involved the terms of a collective bargaining agreement, and (3) under § 514(a) of the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a), because it relates to an employee benefit plan. The motion was denied, and the district court certified the question for interlocutory appeal. Pet. App. 2a.

The Fifth Circuit affirmed. First, the court concluded that under this Court's decision in *International Longshoremen's Ass'n. v. Davis*, 476 U.S. 380 (1986), a party seeking pre-emption under *Garmon* on the grounds that it is accused of conduct "arguably prohibited" by § 8 of the NLRA must demonstrate both that § 8 arguably pro-

hibits such conduct *and* that it is likely to prevail on the merits (i.e., that the Act does not prohibit such conduct). Second, after reading the contract and determining that none of its provisions specifically addressed Plaintiffs' claims, the court ruled that § 301 of the LMRA did not pre-empt the tort action brought under state law, even though *Allis-Chalmers Corporation v. Lueck*, 471 U.S. 202 (1985), requires § 301 pre-emption when the issue is "what the parties to a labor agreement agreed." *Id.* at 211. Third, the court ruled that the VTEP was not an employee benefit *plan* subject to ERISA pre-emption, even though implementation of the VTEP required an ongoing administrative scheme such as that distinguished in *Fort Halifax Packing Company, Inc. v. Coyne*, 107 S.Ct. 2211 (1987).

SUMMARY OF REASONS FOR GRANTING THE WRIT

San Diego Building Trades Council v. Garmon, 359 U.S. 236, places exclusive jurisdiction in the National Labor Relations Board when the conduct in question is "arguably prohibited" by § 8 of the National Labor Relations Act. The Fifth Circuit's decision would require a party seeking pre-emption to demonstrate both that its conduct was arguably unlawful under § 8 of the NLRA and also that it is likely to succeed on the merits before the National Labor Relations Board—two mutually inconsistent propositions. By adopting an inverted interpretation of this Court's decision in *International Longshohemen's Association v. Davis*, 476 U.S. 380, which established the burden of proof under *Garmon* as requiring the party seeking pre-emption to show that the Board "reasonably could uphold a claim based on such an interpretation," 476 U.S. at 395, the court below in effect abolished the "arguably prohibited" prong of *Garmon*.

In addition, the Fifth Circuit's decision would allow state law to control interpretation of a collectively-bargained agreement, which is subject to federal law un-

der § 301 of the LMRA, merely because the court found no specific provision of the VTEP which it believed addressed Plaintiffs' claims. In contrast, this Court concluded in *Allis-Chalmers Corporation v. Lueck*, 471 U.S. 202, that § 301 pre-emption extends to "questions relating to what the parties to a labor agreement agreed." 471 U.S. at 211. Moreover, the Fifth Circuit's decision conflicts with those of several other courts of appeals holding that § 301 pre-emption extends to state law tort claims concerning extra-contractual promises.

Further, the Fifth Circuit erroneously concluded that the VTEP was not an "employee benefit plan," so that the explicit pre-emption provision of ERISA did not apply. The Fifth Circuit relied on this Court's ruling in *Fort Halifax Packing Company, Inc. v. Coyne*, 107 S.Ct. 2211, which held that a state law requiring a single severance payment in the event of a plant closing did not necessitate an administrative process and thus was not an employee benefit *plan* calling for ERISA pre-emption. Here, the negotiated VTEP required GM to create and maintain administrative procedures to process benefit applications, payments, revocations and complaints, so that the Fifth Circuit erred in concluding that ERISA pre-emption did not apply.

The Fifth Circuit's decision conflicts in every important respect with prior decisions of this Court and several of the courts of appeals requiring pre-emption by federal law where Congress has regulated the field. With the National Labor Relations Act, the Labor Management Relations Act, and the Employee Retirement Income Security Act, Congress established an exhaustive federal system for regulating labor-management relations which this Court's decisions traditionally have shielded against excessive interference from private lawsuits under state law. The Fifth Circuit would allow important industrial relations issues to be decided under varying principles of state law, create significant confusion regarding the na-

ture and scope of federal pre-emption of industrial relations, and cause serious concern among the employer community. For these reasons, it is crucial that this Court grant the petition to dispel the confusion and further define the scope of federal pre-emption.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING THAT A PARTY SEEKING PRE-EMPTION UNDER THE NLRA MUST DEMONSTRATE BOTH THAT ITS CONDUCT IS "ARGUABLY PROHIBITED" AND THAT ITS POSITION IS LIKELY TO SUCCEED ON THE MERITS BEFORE THE BOARD IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *GARMON* AND *DAVIS* AND THOSE OF SEVERAL COURTS OF APPEALS AND THUS UNDERMINES FEDERAL LABOR POLICY FAVORING PRE-EMPTION

A. The Court of Appeals' Decision Virtually Eliminates the "Arguably Prohibited" Prong of *Garmon* By Requiring The Party Seeking Pre-Emption To Prove Mutually Inconsistent Propositions

The Fifth Circuit concluded that a party seeking pre-emption under the doctrine established by this Court's opinion in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, must demonstrate not only that its conduct is "arguably prohibited" by § 8 of the National Labor Relations Act, but also that "the Board could reasonably uphold *that party's* claim" (i.e. its claim that its conduct did not violate the NLRA). Pet. App. 8a-9a (emphasis supplied). In so doing, the court below mistakenly applied the burden of proof set forth in *International Longshoremen's Association v. Davis*, 476 U.S. 380, which requires the party seeking pre-emption to "put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation." *Id.* at 395. The Fifth Circuit's decision requires a party

to prove two mutually inconsistent propositions, and thus effectively abolishes pre-emption of all future cases in that Circuit where the alleged conduct is "arguably prohibited" by the NLRA.

This Court in *Garmon* created a standard designed to guide future resolution of the difficult problem of ascertaining where federal regulation ends and state jurisdiction begins.[3] The Court delineated two clear guidelines establishing when an issue is relegated to the exclusive jurisdiction of the Board: (1) "[w]hen it is *clear or may fairly be assumed* that the activities which a state purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, . . ." *id.* at 244 (emphasis added); and (2) "[w]hen an activity is *arguably subject* to § 7 or § 8 of the Act . . . ." *Id.* at 245. (emphasis added).[4] In either of these situations, the Court has decreed that state

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[3] As this Court recognized in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, Congress has not exercised the full scope of its authority under the Commerce Clause to pre-empt the field of industrial relations, but chose instead to regulate only in certain areas, leaving others "free for the operation of economic forces" and still others for regulation by the states. The boundaries between these categories are not clearly delineated, and thus can be defined only through the process of litigation. *Id.* at 240, quoting *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480-81 (1985).

[4] The Court recognized only two exceptions to this rule: it will not find that Congress intended to pre-empt the field "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act," *Garmon*, 359 U.S. at 243, "[o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States of the power to act." *Id.* at 244. A separate line of analysis, not relevant here, has evolved "focusing upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic forces.'" *Lodge 75, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976).

interests must yield to the primary jurisdiction of the National Labor Relations Board.

Tracing the development of judicially created boundaries in this area, the Court observed that "the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency [the National Labor Relations Board], armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." 359 U.S. at 242, citing *Garner v. Teamsters, etc. Union*, 346 U.S. 485, 490-491 (1953).

In the instant case, GM sought *Garmon* preemption on the ground that the plaintiffs' allegations, if true, constituted a charge of conduct arguably prohibited by § 8 (a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), which requires an employer to bargain in good faith with the representatives of its employees. If, as asserted by the plaintiffs, GM misrepresented its position on future employment eligibility during collective bargaining over the terms of the VTEP, or made conflicting representations to individual employees in presenting the plan for their consideration, its good faith under § 8(a)(5) was called into question. Accordingly, Plaintiffs accused GM of conduct that was "arguably prohibited" under *Garmon*, so that jurisdiction over the issue properly belonged with the National Labor Relations Board. On this basis alone, the Court of Appeals' decision that there was not preemption should be reversed.

The Fifth Circuit's error has significance reaching far beyond this case, moreover, because it rests on a fundamental misconstruction of the standard for *Garmon* preemption. In *International Longshoremen's Association v. Davis*, 476 U.S. 380, the Court articulated the burden of proof placed upon a party seeking pre-emption under *Garmon*. Observing that "the pre-emption inquiry is whether the conduct at issue was arguably *protected or*

prohibited by the NLRA," *id.* at 394 (emphasis added), the Court stated:

> If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the Board. . . . The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.

476 U.S. at 395 (citation omitted). As clarified in *Davis*, "a party asserting pre-emption must put forth enough evidence to enable a court to conclude that the activity is arguably subject to the Act." *Id.* at 398. The issue is whether the case raises issues arguably governed by the NLRA, not whether the employer has shown that its conduct violated the Act.

The interpretation given to *Davis* by the Fifth Circuit, however, would effectively abolish the standard set forth in *Davis*, at least for cases involving conduct "arguably prohibited" by the NLRA. Misreading the burden of proof required by *Davis*, the court below stated that "the party attempting to invoke the Board's jurisdiction must then demonstrate that the Board could reasonably uphold *that party's* claim." Pet. App. 8a-9a (emphasis added). It stated that because GM's argument went only to show "that its conduct was arguably *prohibited* by the Board, . . . its claim before the Board could not reasonably be *upheld* by the Board." Pet. App. 9a (emphasis in original).

The Fifth Circuit thus misconstrued this Court's opinion in *Davis* as requiring an employer seeking pre-emption to demonstrate both that its conduct is arguably violative of the NLRA and also that the employer is

likely to win before the Board on the merits of the claim. Moreover, the court appears to have reasoned that if an employer has met the former requirement, it is effectively precluded from meeting the latter. In effect, the court would require the employer to show that the Act arguably prohibits the alleged conduct, but that the Board would uphold the employer's defense. If the credibility of the Board is to be maintained, this standard presents a logical impossibility. The Fifth Circuit's construction of *Davis* thus creates a Catch-22 situation from which no party seeking pre-emption under the "arguably prohibited" prong of *Garmon* can emerge victorious.

Where the "arguably prohibited" prong of *Garmon* is involved, the only reasonable construction of *Davis* is that the moving party must show that *its opponent's* claims, if true, reasonably could be upheld by the Board. This interpretation of the proper legal standard is in accord with well-established national labor policy. Under both the National Labor Relations Act[5] and the Labor Management Relations Act,[6] this Court has required federal pre-emption where "the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations." *Garmon*, 359 U.S. at 243. *See also Local 174, Teamsters v. Lucas Flour Company*, 369 U.S. 95, 103 (1962) ("The dimensions of § 301 [of the LMRA] require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute."). By relegating conduct arguably prohibited by the NLRA to scrutiny under state law, the Fifth Circuit's holding erodes the strong preference for federal pre-emption established by Congress and long maintained by this Court. In an area where there is a compelling need for uniform federal policy, the court below has created a significant

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[5] *See, e.g., San Diego Building Trades Council v. Garmon*, 359 U.S. 236.

[6] *See, e.g., Allis-Chalmers Corporation v. Lueck*, 471 U.S. 202.

gap which allows for the intrusion of varied principles of state law which will lead inevitably to conflicting results.

B. The Court of Appeals' Decision Conflicts With Decisions of Other Courts of Appeals Which Have Applied The *Garmon* Doctrine

Significantly, other federal courts of appeals have reviewed similar cases since *Davis* and have found NLRA pre-emption using the analysis suggested above, without the self-defeating exercise adopted by the Fifth Circuit. In *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 2066 (1989), for example, a group of employees presented a state law fraud claim that the company had obtained concessions from the union by misrepresenting that the plant would remain open. The Eleventh Circuit concluded that the employees' allegations, if taken as true, would constitute a claim of failure to bargain in good faith, and applied *Garmon* to pre-empt the claim. The Seventh Circuit reached a similar result in *Kolentus v. Avco Corporation*, 798 F.2d 949 (7th Cir. 1986), *cert. denied*, 479 U.S. 1032 (1987), holding that state law fraud claims that an employer misrepresented facts and failed to disclose an impending plant closing when negotiating a collective bargaining agreement amounted to unfair labor practice claims under § 8(a)(5) and thus were pre-empted by *Garmon*.[7] The Fifth Circuit's decision thus conflicts with those of other circuits. This dissonance in court rulings must be harmonized by Supreme Court review.

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[7] *See also Overby v. Chevron USA, Inc.*, 884 F.2d 470 (9th Cir. 1989) (recognizing a potential § 8 violation in a state law wrongful discharge claim and remanding for consideration of pre-emption issue).

II. THE COURT OF APPEALS' HOLDING THAT THIS ACTION DOES NOT REQUIRE INTERPRETATION OF A COLLECTIVE BARGAINING AGREEMENT AND THUS IS NOT PRE-EMPTED BY § 301 OF THE LMRA CONFLICTS WITH THE *ALLIS-CHALMERS* STANDARD THAT ISSUES THAT DEPEND UPON THE MEANING OF A COLLECTIVE BARGAINING AGREEMENT MUST BE DECIDED UNDER FEDERAL LAW

A. The Court of Appeals' Erroneous Holding That State Law Claims Are Not Pre-Empted Unless Covered By A Specific Contract Term Substantially Narrows The Scope of Pre-emption Under § 301

The court below held that Plaintiffs' claims were based on rights under state law independent of those created by the collectively-bargained VTEP, so that pre-emption under § 301 of the Labor Management Relations Act would not apply unless the agreement contained provisions that could be construed to govern those rights.[8] Pet. App. 16a. Having reviewed the VTEP and determined that it did not contain any such provisions, the court concluded that § 301 pre-emption did not apply.

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[8] Section 301(a) of the Labor Management Relations Act provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). This Court has held that "Section 301 contemplates suits by and against individual employees as well as between unions and employers." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976). While § 301 does not vest exclusive jurisdiction in the federal courts, *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), it requires that federal law be applied. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

This reasoning conflicts with this Court's decision in *Allis-Chalmers Corporation v. Lueck*, 471 U.S. 202 (§ 301 preempts state law allegations of bad faith handling of disability claim). Instead:

> *questions relating to what the parties to a labor agreement agreed*, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.

Id. at 211 (emphasis added). The proper inquiry in such a case is "whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." *Id.* at 213.[9] Thus, "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law." *Id.* at 220 (citation omitted).

The state law claims in this case are intertwined with the VTEP agreement and substantially dependent upon its interpretation. The VTEP's existence, creation, negotiation, and consequences are the bases for this lawsuit. The parties' total disagreement over what was said about future employment eligibility during the negotiation process raises precisely the issue outlined in *Allis-Chalmers*: a question as to what the parties to the VTEP —the union and GM—agreed. Indeed, the Fifth Circuit itself had to review the VTEP agreement and make a

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[9] *See also International Brotherhood of Electrical Workers, AFL-CIO v. Hechler*, 107 S.Ct. 2161 (1987) (in state law negligence suit by employee against union alleging duty to provide safe working environment, primary inquiry is existence and scope of duty of care imposed by collective bargaining agreement, necessitating contract interpretation).

determination as to its contents in order to reach its conclusion that none of the VTEP provisions affected Plaintiff's claims.[10]

Thus, § 301 pre-emption is compelled. The Fifth Circuit's rationalization ignores the clear mandate of *Allis-Chalmers* that § 301 pre-emption is not limited by the four corners of the contract, but also extends to "questions relating to what the parties to a labor agreement agreed." 471 U.S. at 211. The appropriate avenue of relief in a claim so clearly interrelated with collective bargaining is by way of § 301, not a tort suit under state law. If the Fifth Circuit's holding is permitted to stand, numerous collective bargaining agreements will be subject to state tort suits, undermining the collective bargaining process and resulting in the type of chaos § 301 was designed to prevent.

B. The Fifth Circuit's Holding Conflicts With Decisions Of Other Courts Of Appeals Which Have Concluded That State Law Tort Claims Concerning Extra-Contractual Promises Are Pre-empted By § 301

The Fifth Circuit's holding that Plaintiffs' claims fell outside the collectively-bargained VTEP and thus were not subject to § 301 pre-emption conflicts with decisions of other circuit courts of appeals. The Ninth and Eleventh Circuits have ruled that state law fraud claims aris-

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[10] Unlike the individual contracts reviewed in *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987), where the contract at issue was made when the plaintiffs held managerial positions and before they became employee members of the bargaining unit, Plaintiffs' claims herein are dependent upon a labor contract and concern rights which were discussed during negotiation of the agreement with Plaintiffs' representatives. Similarly, as no independent state statutory right is involved, the instant case differs greatly from *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988) (state tort suit for retaliatory discharge for filing a workers' compensation claim could be decided without interpreting collective bargaining agreement).

ing from extra-contractual promises made to employees covered by a collective bargaining agreement at the time the promises were made are pre-empted by § 301. *DeLapp v. Continental Can Company, Inc.*, 868 F.2d 1073 (9th Cir. 1989) (oral promise not to enforce recall provision of collective bargaining agreement disqualifying employee from receiving early retirement benefits); *Darden v. United States Steel Corporation*, 830 F.2d 1116 (11th Cir. 1987) (promise of job security).[11] Because of the conflict between the decision below and those of the Ninth and Eleventh Circuits, this Court should grant review.

III. THE COURT OF APPEALS' HOLDING THAT THE VTEP IS NOT AN EMPLOYEE BENEFIT PLAN GOVERNED BY ERISA MISCONSTRUES THE VTEP AS A SINGLE EVENT AND THUS MISAPPLIES THIS COURT'S HOLDING IN *FORT HALIFAX*

The court below erroneously relied on this Court's decision in *Fort Halifax Packing Company, Inc. v. Coyne*, 107 S.Ct. 2211, to conclude that ERISA did not pre-empt the tort claims presented here.[12] Pet. App. 19a. In *Fort*

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[11] Parenthetically, a related circuit split exists among cases involving misrepresentations made *before* the aggrieved individuals became employees subject to the collective bargaining agreement. While the Ninth Circuit has held that such claims are pre-empted by § 301, *see Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987), the Third, Eighth and Eleventh Circuits have held that such claims are *not*. *See Berda v. CBS Inc.*, 881 F.2d 20 (3d Cir.), *petition for cert. filed*, No. 89-589 (Oct. 13, 1989); *Anderson v. Ford Motor Company*, 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011 (1987); *Varnum v. Nu-Car Carriers*, 804 F.2d 638 (11th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987).

[12] Section 514(a) of the Employee Retirement Income Security Act (ERISA), comprehensively pre-empts state regulation of employee benefit plans as follows:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or

Halifax, this Court reviewed a state law mandating a single lump sum payment of one week's pay for each year of service to employees affected by a plant closing, and concluded that such a law was not pre-empted by ERISA. The Court reasoned that ERISA pre-emption applies only to employee benefit *plans*, requiring administrative activity, and not to a one-time lump sum payment mandated by the occurrence of a single event such as a plant closing. *Id.*

The VTEP at issue here certainly required GM to do "more than write a check . . . ." *Fort Halifax*, 107 S. Ct. at 2218.[13] Also, unlike the state-mandated one-time severance payment involved in *Fort Halifax*, the VTEP was integrated into a collectively-bargained plan that in turn had other ongoing obligations that were related to rights derived from a broader collective bargaining agreement.[14]

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hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a). As this court has recognized, this section was "meant to establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981).

[13] Severance pay plans can be "employee benefit plans" under ERISA. *See Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *summarily aff'd sub nom. Brooks v. Burlington Industries, Inc.*, 477 U.S. 901 (1986); *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *summarily aff'd*, 477 U.S. 901 (1986). Under Department of Labor regulations interpreting ERISA, severance pay plans, along with "benefits which are in substance severance benefits, although not so characterized," are employee benefit plans under ERISA. 29 C.F.R. § 2510.3-1(a)(3).

[14] For example, the VTEP required filing an application and management approval. Pet. App. 41a. While a lump sum payment was an option, the VTEP also allowed employees to elect to receive their benefits in twenty-four monthly installments, thus necessitating an administrative process to pay benefits over a two-year period. Pet. App. 42a. It included a fourteen-day revocation option as well as a complaint procedure allowing appeal and review under the

The Fifth Circuit's ruling makes employee benefit plans such as the VTEP vulnerable to the nuances of state law, creating a severe burden for employers, particularly those doing business in more than one state. Nor is this an isolated problem; a full forty percent of collective bargaining agreements sampled in a recent study contained severance pay provisions. *See Basic Patterns: Income Maintenance*, Collective Bargaining Negotiations and Contracts (BNA) No. 1144 at 53:2 (April 6, 1989). Under the decision below, the state courts will be treated to a steady flow of severance-related issues that instead should be decided under federal law. The scope of this problem, and the potential negative effect of the Fifth Circuit's decision on Congress' desire for a uniform regulatory ERISA scheme, compel review by this Court.

Supplemental Unemployment Benefit (SUB) procedures established in the main bargaining agreement. Pet. App. 43a. All appeals would be "locally handled." *Id.* Together, these provisions require an ongoing scheme to process applications, revocations, payments and complaints. *Cf. Pane v. RCA Corporation*, 868 F.2d 631 (3d Cir. 1989) (state law contract and tort claims regarding severance pay agreement requiring administrative scheme preempted by ERISA).

Thus, the VTEP contained and required a "set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation." *Fort Halifax*, 107 S.Ct. at 2217.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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